Carpenters Health & Welfare Fund *and* United Food and Commercial Workers Union Local 1776 a/w United Food and Commercial Workers International Union, AFL–CIO, CLC. Case 4–CA–26244

December 8, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On March 20, 1998, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel and the Charging Party each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found that the Respondent violated Section 8(a)(1) and (3) of the Act based on the following conduct. In January 1997,[3] Ed Coryell, the Respondent's cochairman, promised and granted employee benefits to discourage union activity. In May, John Kaiser, the manager of the Respondent's collection department, threatened employees with unspecified reprisals because of their protected wage complaints.[4] Finally, on July 3, David Costello, the Respondent's coordinator of benefit funds, discharged employee Tommasina Storino because she engaged in union activity. We adopt all these findings, but with respect to the promise and grant of benefits and the Storino discharge, we agree with the judge for the reasons stated below.

1. *Promise and grant of benefits*: The Respondent (the Fund), a multiemployer fringe benefit trust fund created pursuant to Section 302 of the Act, is jointly administered by the Carpenters' Metropolitan Regional Council of Philadelphia (the Council) and various employers who are signatory to collective-bargaining agreements with the Council. In the fall of 1996, the Charging Party (the Union or Local 1776) began organizing the Fund's administrative staff employees. During the organizing campaign, the employees wanted to meet with Cochairman Coryell to see if certain grievances could be worked out with the Fund.

On January 8, Coryell met with the employees at their request. None of the Fund's other supervisors or managers attended this meeting which was held in a downstairs conference room of the Fund's building and lasted about an hour.[5] Tommasina Storino testified[6] that the meeting began when

> Mr. Coryell walked in and he said that he was surprised to find out what the meeting was about. He said he assumed that since [Veronica McLaren, the Fund's coordinator of benefits] was retiring that we wanted to talk to him about giving her a party. So he was surprised to find out that that wasn't the case and we had other things to talk to him about.
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> So I opened up by saying that we were, we had contacted Local 1776. The girls had signed pledge cards. We were dissatisfied with our salaries. We weren't making a standard living like—Nobody could live on what we were making and we were dissatisfied. We didn't expect the same raises that management received, but, we just wanted an increase. And we told, we explained to him about our parking. That we were upset about the parking privileges being taken away and the retirement.
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> I explained that when we were hired we were under the assumption that after ten years of service at age 55, you would retire with full benefits. That no longer applied. He took that—That was changed and he said there was nothing he could [do] about that because it involved too many people. We went on at length about that because that was an important issue.

Storino testified that in response to her information about contacting the Union,

> [Coryell] said he was very upset about it, that it wasn't necessary. That we could work things out in-house and that's what he wanted to do. If we chose not to do that, then there was no point in him talking to us. But, he would rather work things out in-house.
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> So we had a long meeting then and he said that he wasn't aware that we were so unhappy with our salaries. Had no idea what we were making, what our salaries were. The parking he said could be worked out. So could we make a list of the things

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to more accurately reflect the violations that he found and in accordance with our decisions in *Indian Hills Care Center,* 321 NLRB 144 (1996), and *Excel Container, Inc.,* 325 NLRB 17 (1997).

[3] All dates are in 1997 unless otherwise indicated.

[4] The parties stipulated to the supervisory status of Kaiser.

[5] The judge mistakenly found that Costello was present for this meeting.

[6] The judge credited Storino's uncontroverted account of the January meetings with Coryell. Coryell did not testify at the hearing.

> that we wanted and give it to him. Give him time to respond to it. He said he wouldn't take very long and he would get back to us. So we agreed that we [would] do that.

According to Storino, the meeting ended with Coryell telling the employees

> to take as long as we needed to discuss what we wanted to do. Whether we wanted to continue with 1776 or stay in-house. If we decided to stay in-house to give him a list of the things that we wanted. And he offered the conference room. He said that we could stay in the conference room as long as we needed.

After Coryell left the meeting, the employees stayed to discuss Coryell's options. Following Coryell's instructions, they made a written list of their complaints. Among the items listed were the employees' dissatisfaction with the recent small increase in their wages and the unfavorable recent changes in their parking and retirement benefits. Storino gave the list, which included her name and was dated January 8, to Coryell's secretary who later submitted it to him.

In late January, Coryell called a general meeting for employees, supervisors, and managers to discuss the employees' January 8 list of grievances. The meeting lasted about a half hour. Storino testified:

> Mr. Coryell said that he looked at our list and that most of our demands were answered. He said that he had gone to the parking lot across the street that all employees, current employees could use, Health and Welfare. He said that [David Costello who succeeded McLaren as the Fund's coordinator of benefits] was getting his booklets together. We had asked for pension booklets and Health and Welfare booklets that we did not have in our possession at that time. But, we wanted to see what our pension plan was and David was taking care of that. He said that he had reinstated the pension and David would speak to the people who were involved.
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> . . . .
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> He increased our annuity. He gave us an increase in our annuity. It wasn't exactly what we had asked for, but, there was a twenty-five cent an hour increase in the annuity and to be patient with the raises. That in May everyone would get a substantial raise so just give him until May and he would take care of that. The meeting ended.

The judge concluded that Coryell unlawfully promised and granted benefits to employees in violation of Section 8(a)(1) of the Act. In challenging this conclusion, the Fund argues that Coryell's January conduct was consistent with the Fund's past practices and open-door policy. However, the Fund provided no example of any similar general meeting held for all employees conducted by Coryell or the Fund in past years before the onset of the Union's organizing campaign.[7] Instead, the Fund focused on evidence of less formal situations where an employee may have individually spoken to a supervisor about a job-related problem. But, even assuming some similarity between these informal, one-on-one discussions and the January group meetings, Coryell did much more than merely listen and receive employee complaints at the January meetings. He specifically conditioned his receipt of their complaints on the abandonment of their union interest, and then he promised and gave better benefits for their "stay[ing] in-house."

The credited evidence shows that Coryell presented the employees with a choice between their union support and a quick, favorable resolution of their grievances by the Fund. Coryell told the assembled employees that he was "very upset" about their union activity; the Union "wasn't necessary;" and he could "work things out in-house and that's what he wanted to do." He then informed the employees "there was no point in him talking to [them]" if they wanted the Union. He emphasized that if they decided to "stay in-house" favorable results on their complaints would follow. He insisted that the employees must first decide if they wanted to continue with the Union before giving him a written list of their complaints. He then offered company space and unlimited worktime for the employees to decide right away "whether [they] wanted to continue with 1776 or stay in-house."

The employees followed Coryell's instructions. After receiving and reviewing the January 8 grievance list from the employees, Coryell convened the late January meeting formally to announce the following good news emanating from their "stay[ing] in-house." Coryell had "answered" most of the employees' complaints; improved their parking privileges; restored retirement benefits to some employees; and promised substantial increases in the scheduled May raises for the employees. Therefore, we find that Coryell's promise and grant of benefits in late January constituted an unlawful interference with the employees' Section 7 rights.[8]

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[7] Cf. *Williams Litho Service,* 260 NLRB 773, 787 (1982) (employer had a past practice of conducting periodic monthly employee meetings to discuss employee problems and solutions). In contrast, see *DTR Industries,* 311 NLRB 833, 834 (1993), where the Board rejected an employer's claim that a communication box and toll-free number instituted during an organizing campaign "simply represented a past practice of soliciting employee complaints through group leaders." These vehicles, the Board held, represented a new approach to grievances which, combined with the speedy remedy of several complaints, unlawfully sought to undermine support for the union."

[8] *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 618, 686 (1944) ("There could be no more obvious way of interfering with these rights of employees than by grants of wage increases upon the understanding that they would leave the union in return. The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination."); *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409 (1964).

2. *Storino discharge*: Tommasina Storino was employed by the Fund for approximately 15 years until her discharge on July 3. The pertinent information relating to her discharge is, for the most part, described in the judge's decision.[9] Before her discharge, Storino took a very active role in the Union's campaign to organize the Fund's administrative staff employees. She initially contacted the Union, arranged union meetings in her home or at local restaurants, and distributed union surveys to employees. The Fund was aware of her union support because she had spoken openly about the Union at the first January meeting with Coryell. Four months later, after she and other employees became dissatisfied with their May raises, she assisted the Union's renewed organizing drive.

Meanwhile, on May 8, Costello counseled Storino about her personal telephone calls at work. She had never before been reprimanded on this subject. Costello told her that (1) the Fund's policy was for employees to keep such calls to a minimum and (2) incoming personal calls on the Fund's 800 telephone number were prohibited. Costello said that she should so advise anyone to whom she had given the 800 number. Storino promised to do so.

Costello testified that later that month when he reviewed the Company's May 25 telephone bill he discovered that Storino was accepting 800 number calls from her son and that other employees might be incorrectly using the Fund's 800 number as well. The Fund had historically permitted the daily long distance calls to Storino from her critically ill son who lived in New York. In fact, the Fund had always treated her son's calls as an emergency or an exception to the Company's telephone policy. Costello admittedly knew about her son's illness and the regular calls to Storino, but he never specified that the Fund had decided to change its practice and would prohibit her son's calls commencing May 8. He never personally confronted Storino or, for that matter, any other employees with questionable telephone habits about the May 25 bill. Instead, he issued a written memorandum addressed to all employees and dated June 4 regarding the Company's policy on personal telephone calls at work.[10]

Thereafter, on June 26, Costello informed Michael Dooley, a Fund trustee, that he was thinking about discharging Storino because of her son's calls. Dooley, a mutual friend of both Storino and Costello, accused Costello of engaging in union discrimination. After listening to Costello's explanation for disciplining Storino, Dooley was so convinced about Costello's discriminatory motive that he promised if any "drastic action" was taken against Storino that he would help her sue the Fund.

Later that same day, Costello met with Storino alone in his office. Without having the benefit of the June phone bill, he nonetheless accused her of having ignored his May 8 warning by allowing her son to use the Fund's 800 number. Storino said that she never thought that Costello meant for her to cease taking her son's calls. She offered either to pay for her son's calls or arrange for the installation of a long distance telephone line at her son's residence if Costello would allow the calls to continue for only a few weeks longer until her son's intended move to a new apartment was completed. Costello rejected her offers because he claimed that her time away from work, and not the cost of the calls, was the problem.[11]

Storino discussed this problem with Costello later that evening and again the following morning. Costello testified that on June 27, he mentally decided to discharge Storino, but he wanted to wait to take any formal action until he received the Fund's next telephone bill.[12]

About a week later on July 2, Wendell Young, the Union's president, telephoned Coryell and demanded voluntary recognition of the Union by the Fund.[13] He also told Coryell that the Union's chief contact (referring to Storino) had been mistreated by the Fund because of her union activity. Coryell's response to Young was, "You do what you have to do." A short while later, Coryell summoned Costello to his office and told him about Young's call. The next day, after consulting with Coryell and the Fund's counsel, Costello notified Storino that she was terminated.[14]

[9] Our factual summary of the pertinent facts and events concerning Storino is based on the judge's decision with one exception. In sec. III,A, pars. 10 and 11 of his decision, the judge incorrectly implied that a private conversation between Michael Dooley and Costello occurred *after* Costello met with Storino in his office on June 26. The record shows that the Dooley conversation happened first.

[10] The memo stated, in pertinent part:

> It is the policy of the Fund Office that incoming and outgoing personal telephone calls be limited to emergency situations. In order for the Fund Office to operate efficiently it is mandatory that all employees follow this policy.
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> Use of the 800 number for personal incoming long-distance calls must be strictly prohibited. No employee should be giving out this number to receive personal long-distance calls. Use of the 800 number must be restricted to the membership and business.

[11] The Fund's June 25 monthly bill shows 23 calls from Storino's son totaling 89.2 minutes at a cost of $23.55. Some of these calls occurred during Storino's lunchbreak.

[12] The June 25 bill was received by Costello on July 2.

[13] Young's testimony about this conversation stands uncontroverted because Coryell did not testify at the hearing.

[14] In Storino's termination letter dated July 3, Costello states that the discharge was based on the following reasons:

1. Loss of time through excessive personal telephone calls;
2. Unauthorized use of the Fund's long-distance telephone system;
3. Insubordination by her refusal to obey specific orders from appropriate Fund officials and by her refusal to terminate the abuse of the Fund's telephone system;
4. Refusal to adhere to reasonable Fund rules;
5. Direct disobedience and disrespect to Fund officials; and
6. Lying to the Fund coordinator regarding her usage of the 800 line and about her former manager's allegedly excessive use of the line.

Applying the Board's *Wright Line*[15] causation test, the judge found that Storino's union activity was a motivating factor in the Fund's decision to terminate her. He further found that the Fund did not carry its burden of persuasion in establishing that Storino's discharge would have occurred absent her protected union conduct. In its exceptions, the Fund presents two arguments: first, that several elements of the General Counsel's prima facie case—union activity, knowledge, and animus—are missing here; and second, that the evidence shows that Storino would have been discharged in any event regardless of her union activity. As explained below, we reject these arguments.

The Fund claims that it had no direct knowledge of Storino's union sympathies because her union activity was not particularly noteworthy as compared to other employees' union activity. The record belies this claim. As previously described, Storino spearheaded the Union's organizing campaign. At least by January 8, her prounion stance became well known to the Fund. On that date, Storino notified Coryell that "we," the employees, had contacted the Union, signed union authorization cards, and had complaints about the Fund's recent changes in wages and working conditions. Her name was also prominently displayed on the January 8 grievance list submitted to Coryell. Later on, her union association was again highlighted during Costello's conversation with Dooley on June 26 and Coryell's conversation with Young on July 2. Finally, on the day before Storino's discharge, Coryell spoke to Costello about Young's conversation, including the comments about Storino's union connection. Thus, there is ample evidence to show that the Fund was aware of Storino's union activity and sentiments before her discharge.

The Fund additionally contends that the General Counsel did not offer a scintilla of evidence showing animus on the part of the Fund toward union activities. In support of this contention, the Fund points out that (1) there were no disparaging remarks about the Union attributed to either Coryell or Costello; (2) the judge, in section III,B,3, paragraph 2 of his decision, found "no evidence of animus, and it can be inferred that the Fund managers, being closely related with the carpenters unions, would be generally sympathetic to labor;" and (3) the timing of Storino's discharge alone does not suggest any antiunion animus. We find no merit in the Fund's contention.

It is well established that an improper employer motivation may be inferred from circumstantial as well as direct evidence. See, e.g., *NLRB v. Buckhorn Hazard Coal Corp.,* 472 F.2d 53, 55 (6th Cir. 1973) (per curiam) ("Since direct evidence of motivation which is not also self-serving is seldom available, the motivation required to establish unlawful discrimination may be shown by less than direct evidence."). Thus, even if the judge found no *direct* evidence of animus, he properly continued in section III,B,3, paragraph 2 of his decision with an examination of a variety of factors indicative of animus, such as the 8(a)(1) violations committed by Coryell; Kaiser's unlawful May threats to employees, including Storino; and the timing of Storino's discharge in relation to Young's July 2 recognition demand. All these factors reasonably suggest an antiunion animus. Furthermore, as discussed by the judge, there are other indicators of animus: Costello's discredited inconsistent explanations for Storino's discharge and Costello's disparate investigation of only the telephone habits of Storino, a vocal union supporter. Therefore, we find sufficient evidence of animus.[16]

Accordingly, we find that the General Counsel has established a prima facie case that the Fund discharged Storino because of her union activity. Storino was an active union supporter whose union sympathies were well known to the Fund. The Fund illegally promised and granted benefits to employees to dissuade them from supporting the Union and it threatened employees with unspecified reprisals.

The Fund argues that Costello's stated reasons for discharging Storino were justified because "her actions amounted to willful misconduct in disregard of the Fund's rules and policies." However, the judge discredited Costello's denial of union discrimination. He specifically found that Costello's variable explanations for discharging Storino were inconsistent and did not accurately reflect the Company's telephone policy set forth in Costello's June 4 memorandum to employees. Among other things, the judge stated that "at times Costello seemed to take the position that use of the 800 number was not critical" and "[a]t other times Costello seemed to focus on the 800 number." The judge further observed that Costello testified that total prohibition of personal use of telephones, including the 800 number, has never been the Fund's policy. Yet, the June 4 memorandum prepared by Costello indicates that the use of the 800 number was prohibited. In any event, prior to May 8 the Fund had always treated the calls from Storino's son as an emergency or an exception to the Company's telephone policy. The Fund only began to prohibit her son's 800 number calls and discipline her after she became

[15] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). In *Office of Workers' Compensation Programs v. Greenwich Collieries,* 512 U.S. 267, 276–278 (1994), the Supreme Court clarified *Transportation Management* in noting that, while the ultimate burden of proof remains with the proponent of the violation, the employer shoulders the burden of persuasion to sustain its affirmative defense. See *Manno Electric,* 321 NLRB 278 fn. 12 (1996), enfd. per curiam mem. (5th Cir. 1997).

[16] To the extent that the judge's decision could be read to indicate that there was "no evidence of animus," for the foregoing reasons, we reject such a finding.

involved in the Union and the Union's organizing campaign was renewed in May. Other employees also had questionable telephone habits that were known to Costello, and Costello did not investigate or take corrective action. Thus, we find that the Fund has failed to satisfy its *Wright Line* burden of showing that Tommasina Storino would have been discharged notwithstanding her union activity.[17] Accordingly, we affirm the judge's conclusion that Storino's discharge violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Carpenters Health & Welfare Fund, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising and/or granting benefits to its employees in order to discourage their union activity.

(b) Threatening its employees with unspecified reprisals in order to discourage them from engaging in protected concerted activity.

(c) Discharging or otherwise discriminating against its employees because they engage in union or other protected concerted activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Tommasina Storino full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Tommasina Storino whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Tommasina Storino and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Philadelphia, Pennsylvania office, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since late January 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

[17] See *Hospital del Maestro,* 323 NLRB 93, 95 (1997) (union activist unlawfully fired for personal use of computer where she had been given permission to use the computer for personal matters; it had been a practice for other employees to do the same, yet she was the only employee discharged for engaging in such conduct); *McDaniel Ford, Inc.,* 322 NLRB 956, 962–963 (1997) (no showing that the employer would have issued a disciplinary warning to the shop steward absent his union activities); *Bryant & Stratton Business Institute,* 321 NLRB 1007, 1026–1028 (1996), enfd 140 F.3d 169 (2d Cir. 1998) (the employer unlawfully disciplined faculty members for ending their class periods early where discipline had never previously been invoked for that reason); and *Thill, Inc.,* 298 NLRB 669, 670 (1990), enfd. in relevant part 980 F.2d 1137 (7th Cir. 1992) (warnings issued on the basis of conduct for which no other employee had ever been warned).

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT promise and/or grant benefits to our employees in order to discourage their union activity.

WE WILL NOT threaten our employees with unspecified reprisals in order to discourage them from engaging in protected concerted activity.

WE WILL NOT discharge or otherwise discriminate against our employees because they engage in union or other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Tommasina Storino full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Tommasina Storino whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Tommasina Storino, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

CARPENTERS HEALTH & WELFARE FUND

Margaret McGovern, Esq., for the General Counsel.
Stephen J. Holroyd, Esq., of Philadelphia, Pennsylvania, for the Respondent.
James Funk, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Philadelphia, Pennsylvania, on January 20 and 21, 1998, upon the General Counsel's complaint which alleged that the Respondent discharged Tommasina Storino in violation of Section 8(a)(3) of the National Labor Relations Act (the Act). It is also alleged that the Respondent committed certain violations of Section 8(a)(1) of the Act.

Though admitting the discharge of Storino on July 3, 1997,[1] the Respondent generally denied that it committed any violations of the Act and affirmatively contends the complaint should be dismissed as being barred by Section 10(b) of the Act.

On the record[2] as a whole, including my observation of the witnesses, briefs and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent (the Fund) is a trust fund engaged in providing health insurance and other benefits for employees of participating employers. In the conduct of this business, the Respondent annually receives contributions from employers in the Commonwealth of Pennsylvania in excess of $50,000, which employers annually purchase and receive goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The Respondent admits, and I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Food and Commercial Workers Union Local 1776 a/w United Food and Commercial Workers International Union, AFL–CIO, CLC (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Respondent is a typical fringe benefit trust created pursuant to the provisions of Section 302 of the Act. While the Respondent has an equal number of union and employer trustees, the union trustees appear to have more presence in the Respondent's daily operation. Thus the Respondent's offices are in a building adjoining one in which the various constituent unions have offices, including the president of the Carpenters District Council and the Fund's cochairman Edward Coryell, and labor trustee Michael Dooley, the business manager for a local union of the Council. The Respondent's administrative staff is headed by David Costello, the coordinator of Benefit Funds. In addition, the Respondent employees about 22 individuals who perform a variety of tasks associated with operating such a fund.

Tommasina Storino worked for the Respondent about 15 years, the last 7 of which were as a full-time employee. In the fall of 1996 she contacted Edward Chew, the union director of organizing, and a personal friend, about the prospect of having the Union represent the Respondent's employees. Chew then had a meeting at Storino's house in mid-October with employees (including a few office employees of the various carpenters unions). At a second meeting in November Chew passed out authorization cards and asked those interested to mail a signed card to him. He ultimately received 20 cards. Nevertheless, the employees asked Chew not to pursue seeking representation, in order for them to see if they could work out their grievances with the Respondent's management.

This led to a meeting requested by employees with Coryell and Costello in early January 1997. A number of items were discussed, including parking, salary increases, and restoring retirement benefits for 10-year employees. Storino testified that she opened the meeting by stating that they had contacted the Union, had signed pledge cards and were dissatisfied with their salaries, among other things. Coryell asked that they make a list of things they wanted and he would respond and they could decide whether "we wanted to continue with 1776 or stay in-house." They did write out a memorandum dated January 8 stating their "List of request" and gave it to Coryell.

[1] All dates are in 1997, unless otherwise indicated.

[2] On reconsideration, I reverse my rejection of the unemployment compensation decision offered by the Respondent, and I have considered it in evaluating the evidence here. *Cardiovascular Consultants of Nevada, MI,* 323 NLRB 67 fn. 2 (1997).

There was then a second meeting in late January with Coryell, and other management personal including Costello, who at the time was the assistant coordinator of benefits. Coryell stated that most of the demands had been answered. For instance, employees would be allowed to use the parking lot across the street and that their pension plan concerns were being looked into by Costello. Coryell further said that they would be receiving substantial raises in May.

According to Storino, when the meeting ended "we were going to stay in-house and we were pretty satisfied. Or we were just going to wait until May and see what happened with the raises." A few days later, Costello met with employees at which he was introduced by the then coordinator of benefits as the new coordinator. Storino testified that Costello "asked us to give him a chance and not to do anything. That he would take care of it, take care of things for us and to trust him, and just work with him." Storino then contracted Chew and told him they were waiting until May, that Coryell had answered most of their issues and they wanted to see what would happen with their raises.

By letter dated March 6 Costello advised Storino that Coryell had authorized a plan change such that she would be eligible for theretofore unavailable health benefits upon retirement. And in early May, the raises were given, but fell far short of what the employees expected. Thus, Chew was again contacted and the employees met with him in late May.

On May 8 Costello observed Storino making what appeared to be a personal telephone call. When confronted, she admitted to making and taking personal calls. Costello told her that the Respondent's policy was to keep such calls to a minimum. He further told her that use of the Respondent's 800 number for personal incoming calls was prohibited and she should so advise anyone to whom she had given the number.

Costello testified that based on the telephone bill of May 25, he concluded that Storino had ignored his instructions. The bill also shows that other employees living outside the local area code made numerous calls to their homes; however, this does not appear to have been given much, if any, consideration by Costello. In any event, he issued a memo on June 4 to the effect that personal calls should be kept to a minimum and that the use of the 800 number for personal calls was prohibited.

On June 26 he had another discussion with her about this matter. Storino told Costello that she did not intend to cease taking regular calls from her son who lives in New York City and is critically ill with a blood disease, of the same type her daughter died from a few years ago. She offered to pay for the calls, but Costello said that money was not particularly important, it was the time. She also said she would try to get a telephone for her son so he would not have to use the 800 number and she testified that she purchased a calling card for him, but it is unclear when this occurred. The meeting ended with Storino stating she would have to be fired before she would cease taking calls from her son and as she left Costello's office, she slammed the door.

Costello sought out Dooley, his life-long friend and a close friend of Storino, to tell him that he was contemplating discharging Storino because of the telephone dispute. This Dooley questioned, telling Costello he felt the proposed action related to Storino's union activity. That evening Dooley called Costello and then put Storino on the phone. Costello asked if she had quit and she said no. She then apologized for slamming the door and told him she was being picked on.

The next day Storino came to work. About 11 a.m. Costello again met with her and asked if she would stop the calls. She told him she could not stop taking calls from her son, but she again offered to pay for the calls. He said that was not acceptable and suggested other ways to contact her son.

On July 2 Costello received the June 25 telephone bill, which, he testified, confirmed his suspicion that Storino had not stopped taking 800 number personal calls. While this exhibit shows, and Storino admits, that she continued to take 800 calls from her son (23 calls totaling 89.2 minutes at a cost of $23.55), there is no persuasive showing that she took other personal calls on the 800 number. Costello discussed the situation with Coryell and then counsel and on July 3, terminated Storino.

B. Analysis and Concluding Findings

1. Promise and grant of benefits

After meeting with employees in early January, and receiving their list of requests, Coryell again met with them in late January and stated that their parking privileges had been restored, that pension benefits would be restored (which was subsequently done) and that they would be given substantial raises in May. It is alleged that the Respondent thereby committed violations of Section 8(a)(1).

Notwithstanding that the employees initially asked to meet with Coryell, to announce that employee concerns would be rectified, and to do so by granting benefits is clearly violative of Section 8(a)(1) of the Act, where done during the course of an organizational campaign. Though these benefits were given in the absence of other unfair labor practices, nevertheless "reasonable employees would have viewed the new benefits as having been conferred by the Respondent in order to undermine support for the Union." *Reno Hilton,* 319 NLRB 1154, 1156 (1995).

2. Threats by John Kaiser

John Kaiser is the manager of the collections department, which is one of the four organizational groups of the Fund. It is alleged, and denied, that he is a supervisor. However, he has employees working in his department and he is admittedly a manager.

On the first of May, Kaiser called Storino into his office to tell her what her raise was to be and she told him it was "not a substantial raise." It was the same raise employees had received previously and she told him she was dissatisfied. He told her to see Costello and he further said, "[If] you're thinking about doing anything, don't because for every action there will be a reaction."

Similarly, Shirley Sweat complained to Kaiser about the inadequacy of her raise and he said, "Well, for every action there's a reaction." Robin Thomas testified that Kaiser told here she did an outstanding job and that her raise would be 4percent, which made her "very, very angry." He said that she would need to speak to Costello, "But just remember, for every action there's a reaction."

Though noting that the Respondent faces a heavy burden concerning this allegation since Kaiser did not testify, counsel argues that the testimony of Storino, Sweat, and Thomas is inherently incredible. I conclude otherwise. While the action-reaction comment might be somewhat ambiguous, in context he clearly threatened employees. He made this statement after each had expressed strong dissatisfaction with their raises,

which had been promised to be substantial. Accordingly, I conclude that the Respondent violated Section 8(a)(1) as alleged; and, it is reasonable to infer that the reaction of Storino and the other employees to the raises was communicated to Costello by Kaiser. Absent any evidence to the contrary, I so find.

3. The discharge of Tommasina Storino

The issue involving the discharge of Storino is whether it was motivated, at least in part, by the employees' union activity and Storino's participation therein. While there is some persuasive evidence that the discharge resulted from a test of wills, on balance I conclude that the union activity was a motivating factor; and, I conclude that the Respondent did not carry its burden of proving that notwithstanding the union activity, Storino would have been discharged when she was. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

There is no evidence of animus, and it can be inferred that the fund managers, being closely associated with the carpenters unions, would be generally sympathetic to labor. However, that employees were organizing was known to Costello in January. The Fund in fact granted benefits to keep the situation "in house." Costello as the new chief operating officer asked employees to "give him a chance." Kaiser threatened employees when they complained about the small size of their raises. And finally, at least by the time Costello discharged Storino he knew that the employees had renewed their organizational campaign, having been so notified by Coryell who received a call from the Union's president on July 2.

Costello testified that he decided in his mind on June 27 to discharge Storino for continuing to take 800 number calls but waited until receiving the June bill to verify his suspicion. He further testified that her union activity played no part in the his decision. On balance, I do not credit this denial.

The June bill shows calls from the New York home of Storino's son, but there is no suggestion from Costello that other personal calls came in for Storino that month. (Counsel argues that the bill shows 130.5 minutes of, presumably, 800 number calls but how this figure was derived is not given.) Costello does not dispute that Storino was cooperative and when he asked her in May for the numbers of her family to check against the telephone bill she gave them. The thrust of Costello's testimony was that Storino refused to recognize his authority to make rules and to abide by his instructions and cease taking calls from her son. He knew that her son was critically ill and that she had been talking to him at the office most days for a long time. He acknowledged that she offered to pay for these calls but he declined on grounds that the time away from work was the critical matter, even while noting that she took some of these calls on her lunch break. And he acknowledged that she asked for a couple weeks in order to have a line installed for her son so he could call her without using the 800 number.

In his testimony, at times Costello seemed to take the position that use of the 800 number was not critical—simply that Storino was taking too much time away from work on personal calls. At other times Costello seemed to focus on the 800 number. In short, his explanation of why he had to discharge Storino was inconsistent, particularly in light of the Respondent's stated policy. The policy, as set forth in the June 4 memo (and earlier memos) does not prohibit personal calls. It states only that such calls should be kept to a minimum and to emergencies, if possible. As Costello testified, total prohibition of personal use of telephones, including the 800 number, has never been the Fund's policy.

Storino's well known situation with her critically ill son has for years been viewed either as an emergency or an exception to this policy. Costello testified that he knew of her son's illness and the fact that he called her regularly. Costello did not explain why he felt it necessary to stop allowing Storino to talk to her son most days during working hours.

Between the onset of Costello's stated concern on May 8 and his second confrontation with Storino on June 26 was about 7 weeks; and he waited another week to discharge her after testifying he made the decision, on grounds he wanted to check the June bill. Yet he would not give Storino the 2 weeks she asked for in order to set up a system with her son not involving the 800 number. This is inconsistent with Costello's stated concern to work out the situation with Storino.

I therefore conclude that Costello must have been motivated by considerations other than Storino simply taking 800 number calls from her son. Given that the organizational campaign, which had been quiescent, was rekindled in May when the employees concluded that their raises were inadequate, I conclude that the motivation included the employees' union activity. Since Storino was one of the leaders, and was known to be such at least by the time of her discharge, I conclude that her discharge was violative of Section 8(a)(3) of the Act. I further conclude that Costello's testimony is not persuasive that he would have discharged Storino in the absence of the union activity.

IV. REMEDY

Having concluded that the Respondent committed certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including reinstating Tommasina Storino her former job, or if that job no longer exists, to a substantially identical position of employment and make her whole for any loss of wages or other benefits she may have suffered in accordance with the formula set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]